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The Right of Privacy

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respondent *must* be disbarred, but in case of any other crime the disbarment would only follow if the court deemed the crime such as showed him "to be unfit to be trusted in the duties of his profession." By the new amendment disbarment for felony also is subject to this same restriction, *i.e.*, it must be adjudged that the felony is one which shows the lawyer its unfit to be trusted. It may be argued that the standing of the profession was better protected by a rule which assumed that, regardless of individual professional trustworthiness, a convicted felon should be excluded from its ranks.

The other change⁵ is an eminently practical and desirable one. It confers power on the judge of the Superior Court to institute an investigation into any reported cause for disbarment or suspension, and to that end he may appoint three to five lawyers as commissioners with power to summon and examine witnesses. Presumably, however, the Committee on Grievances must still formally institute final proceedings for disbarment or suspension, in the class of cases, stated above, where it was formerly required to do so.

NOTES

THE RIGHT OF PRIVACY

In Edna Ferber's comparatively recent novel, "Show Boat," she introduced in one incident, a character called "Little Wayne Damron." The possessor of that name sued the author, the publisher and a bookseller, claiming a cause of action under sections 50 and 51 of the New York Civil Rights Law. Recovery was not allowed.¹

These sections of the statute were passed as the result of the decision of the New York Court of Appeals in the case of *Roberson v. Rochester Folding Box Co.*² They provide that the name or picture of a living person may not be used for purposes of advertising or trade without his consent.³ They have been strictly construed, the

⁵ Chap. 285, Laws of 1929.

¹ *Damron v. Doubleday, Doran & Co.*, 231 N. Y. S. 444 (1928), commented on in (1929) 42 Harv. L. Rev. 709.

² 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 378, 89 Am. St. Rep. 828 (1902). (Plaintiff's picture used on a flour advertisement. Injunction denied). This case aroused a great deal of comment and criticism. The criticism moved Judge O'Brien, at that time a member of the New York Court of Appeals, who concurred in Judge Parker's majority opinion, to write a defense of the case which appeared in (1902) 2 Col. L. Rev. 437. See also (1901) 1 Col. L. Rev. 491 and (1902) 2 Col. L. Rev. 486 (comments on the decisions in the Appellate Division and Court of Appeals respectively).

³ The constitutionality of the statute was upheld in *Rhodes v. Sperry & Hutchinson Co.*, 193 N. Y. 223, 85 N. E. 1097 (1908).

court holding that the statute was aimed chiefly at the situation of the *Roberson* case and had to be interpreted in that light.⁴

As a matter of statutory construction the decision in the instant case is correct, but it serves to bring back into the legal limelight the question of the right of privacy. The first serious plea for legal recognition of a right of privacy in this country appeared in an article by Messrs. Warren and Brandeis in the *Harvard Law Review*.⁵ Since that time the law reviews have waged a consistent fight for the acknowledgment of the right.

The judges, however, have been more conservative than the editors, and American authority is effectively split on the question. The cases denying the existence of the right have placed their decisions on the following grounds: (1) that there is no precedent;⁶ (2) that it would subject the courts to a flood of litigation;⁷ (3) that it would curtail freedom of speech and of the press;⁸ and (4), in cases where an injunction was sought, that equity has jurisdiction only where property rights (on the authority of *Gee v. Pritchard*)⁹ or breach

⁴ Thus the instant case says the *Roberson* case indicates the mischief to be suppressed. *Jeffries v. N. Y. Evening Journal Pub. Co.*, 67 Misc. Rep. 570, 124 N. Y. S. 780 (1910) decided the statute did not apply to newspapers. *Humiston v. Universal Film Mfg. Co.*, 189 App. Div. 467, 178 N. Y. S. 752 (1919), held it not applicable to news films. Other cases construing the statute are *Binns v. Vitagraph Co.*, 210 N. Y. 51, 103 N. E. 1108 (1913); *Merle v. Sociological Research Film Corp.*, 166 App. Div. 176, 152 N. Y. S. 829 (1915); *D'Altomonte v. N. Y. Herald Co.*, 154 App. Div. 453, 139 N. Y. S. 200 (1913); *Rosenwasser v. Ogoglio*, 172 App. Div. 107, 158 N. Y. S. 56 (1916). See also (1917) 17 Col. L. Rev. 735 and (1920) 20 Col. L. Rev. 100 (comments on *Humiston case*), and note, (1911) 34 L. R. A. (N. S.) 1137.

⁵ *The Right to Privacy* (1890) 4 Harv. L. Rev. 193.

⁶ *Roberson v. Rochester Folding Box Co.*, *supra* note 2; *Henry v. Cherry*, 30 R. I. 13, 73 Atl. 97, 24 L. R. A. (N. S.) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006 (1909), commented on in (1909) 9 Col. L. Rev. 641 and (1910) 8 Mich. L. Rev. 221; *Hillman v. Star Publishing Co.*, 64 Wash. 691, 117 Pac. 594, 35 L. R. A. (N. S.) 595 (1912), commented on in (1912) 46 Am. L. Rev. 587 and (1912) 10 Mich. L. Rev. 335, which admits there is a wrong but says there is no remedy; *Atkinson v. Doherty & Co.*, 121 Mich. 372, 80 N. W. 285, 46 L. R. A. 219, 80 Am. St. Rep. 507 (1899). These cases state that the remedy must come by statute, but the New York Legislature is apparently the only one which has acted upon the suggestion. See Wilbur Larremore, *The Law of Privacy* (1912) 12 Col. L. Rev. 693, suggesting that a statute covering the advertising cases is comparatively easy to frame, but that in cases of "absolute privacy" no statutory remedy is feasible.

⁷ Cases cited *supra* note 6.

⁸ Cases cited *supra* note 6. The *Hillman* case is really the only one in which the fact situation justifies a serious discussion of freedom of the press.

⁹ 2 Swanst. 402, 36 Eng. Rep. 670 (1818). An injunction was granted, on the ground of literary property, to restrain the publication of letters written by the plaintiff to defendant.

of confidence or trust (on the authority of *Prince Albert v. Strange*)¹⁰ are involved and cannot protect purely personal rights.¹¹

The cases recognizing the right have answered: (1) that mere lack of precedent should be no deterrent; that the case only offers opportunity for a new application of an old principle—the constitutionally-guaranteed right to personal liberty;¹² (2) that recognition of privacy would occasion no more unjustifiable litigation than the recognition of any other right; that if cases are numerous it will only indicate the usefulness of the remedy;¹³ (3) that privacy and freedom of speech and of the press are co-existent and compatible, not mutually exclusive rights;¹⁴ and (4) that the Chancellors in *Gee v. Pritchard* and *Prince Albert v. Strange*, and particularly in the former instance, merely seized upon the pretext of property rights

¹⁰ 1 Macn. & G. 25, 2 De. G. & S. 652, 64 Eng. Rep. 293 (1849). Equity on the grounds of property rights and breach of trust, restrained the publication of a description of plaintiff's etchings, at least by printing or writing, though not by copy or resemblance.

¹¹ Probably the best analysis of the authorities before 1902, on the side of strict construction, is to be found in the Roberson case. For a case typical of the attitude that equity can interfere only where property rights are involved see *Brandreth v. Lance*, 8 Paige (N. Y.) 24 (1839). Cf. *Mackenzie v. Soden Mineral Springs Co.*, 18 N. Y. S. 240 (1891).

¹² *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Am. & Eng. Ann. Cas. 561 (1905), commented on in (1905) 5 Mich. L. Rev. 559; *Munden v. Harris*, 153 Mo. App. 652, 134 S. W. 1076 (1911). The *Pavesich* case states that lack of precedent is not controlling, attempts to show a precedent by reference to Roman Law and by drawing analogies to other situations in which the law protects personal rights, and then brings privacy within the scope of the constitutional guarantees. The *Munden* case holds that the novelty of the claim is no objection to granting relief.

¹³ *Pavesich v. New Eng. Life Ins. Co.*, *supra* note 12. It may be of some significance that in New York, where the court feared a flood of litigation, and the Legislature passed a statute covering only a portion of privacy, litigation has been frequent. In Georgia, on the other hand, where the court recognized the whole right, only one case has since arisen which really involves the question, and that case is not strictly one of privacy. *Stark v. Hamilton*, 149 Ga. 227, 99 S. E. 861 (1919), commented on in (1920) 5 Cornell L. Q. 177, where an injunction was granted restraining defendant, who had debauched plaintiff's minor daughter, from communicating with her in any way. Cf. *Ex parte Warfield*, 40 Tex. Crim. 413, 50 S. W. 933 (1899).

¹⁴ Cases cited *supra* note 12; *Brents v. Morgan*, 221 Ky. 765, 299 S. W. 967, 55 A. L. R. 964 (1927), commented on in (1928) 13 Cornell L. Q. 469 and (1928) 1 So. Cal. L. Rev. 293. In the advertising cases there is no real necessity of raising the issue of freedom of the press, and in several such cases recognizing the right of privacy it has not been seriously raised. *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S. W. 364, 34 L. R. A. (N. S.) 1137, 135 Am. St. Rep. 417 (1909); *Kunz v. Allen*, 102 Kan. 883, 172 Pac. 532, L. R. A. 1918D 115 (1918).

as a means of protecting the right of privacy in an era when the latter right was unknown.¹⁵

It seems to the writer that the states in which the question has not yet been litigated, among which is North Carolina, should have little difficulty in allowing recovery, when occasion does arise, in at least one class of cases—those where a person's name or picture has been unauthorizedly used for commercial purposes. And this is true even though they adopt the narrow test of a property right. The enormous increase in testimonial advertising has demonstrated beyond a doubt that a name or picture capable of use in such a connection is worth money. This economic interest must be recognized, either upon the theory that the plaintiff can sell it himself or upon the theory that the defendant, by his use of it, has admitted its value.¹⁶ And if the court wishes to place the decision upon a

¹⁵ This construction was forcibly urged by Messrs. Warren and Brandeis, *op. cit. supra* note 5, and in (1927) 25 Mich. L. R. 889. It was adopted by the Pavesich case, *supra* note 12. Munden v. Harris, *supra* note 12, finds a property right in a picture. Douglas v. Stokes, 149 Ky. 506, 149 S. W. 849, 42 L. R. A. (N. S.) 386, Ann. Cas 1914B 374 (1912) thinks it would be a reproach to the law if incorporeal injuries could not be recovered for. These cases, however, are all damage suits and not prayers for injunction. But see the dictum in Vanderbilt v. Mitchell, 72 N. J. Eq. 910, 67 Atl. 97 (1907), stating that equity has jurisdiction where property rights are not involved, citing the Pavesich case as authority.

The question of privacy is only one phase of the battle over property rights and the construction of *Gee v. Pritchard*. It involves the whole field of equitable jurisdiction over injuries to personality. See, on common law rights to intellectual productions, note (1901) 51 L. R. A. 353 and (1926) 12 Va. L. Rev. 656; and on rights of the owner of a photograph see note (1901) 50 L. R. A. 397 and note (1907) 7 L. R. A. (N. S.) 362. On the general subject of rights of personality (including privacy) see: Pound, *Equitable Relief against Defamation and Injuries to Personality* (1916) 29 Harv. L. Rev. 640; Long, *Equitable Jurisdiction to Protect Personal Rights* (1923) 33 Yale L. J. 115; Larremore, *op. cit. supra* note 6; note (1921) 14 A. L. R. 295; note (1897) 37 L. R. A. 783; (1927) 25 Mich. L. Rev. 889; (1917) 1 Minn. L. Rev. 71; (1920) 5 Cornell L. Q. 177.

¹⁶ See note (1910) 24 L. R. A. (N. S.) 991. And Munden v. Harris, *supra* note 12, takes the attitude that if peculiarities of a person's appearance are to be a matter of merchandise it should be for his profit. In contrast with this is Judge O'Brien's attitude (*op. cit. supra* note 2): "A woman's beauty, next to her virtue, is her earthly crown, but it would be a degradation to hedge it about by rules and principles applicable to property in land or chattels."

If the present fad for testimonial advertising continues it is conceivable that plaintiffs will prefer to bring their actions in such cases upon the theory of property rather than of privacy because: (1) it will be difficult to convince a jury that plaintiff has been substantially mortified (except perhaps in cases where the commodity advertised is of questionable nature) in an era when no stigma attaches to an appearance in a testimonial capacity; and (2) if the plaintiff has permitted his name and picture to be used by one advertiser, subsequent unauthorized use by another will hardly be a serious invasion of privacy but will involve considerable damage to the property right.

broader basis and recognize the right of privacy, it no longer faces an absence of precedent.

Privacy, however, included more than prevention of commercial use. The question has arisen in the following illustrative cases: newspaper, in connection with its story of an indictment for fraud, printing a picture of the suspect's daughter;¹⁷ placing plaintiff's picture in the rogue's gallery before conviction;¹⁸ "shadowing" by private detectives;¹⁹ publishing a biography and picture of the plaintiff's deceased husband;²⁰ exhibiting a bust of the plaintiff's deceased relative as the ideal feminine philanthropist;²¹ using plaintiff's picture in an actors' popularity contest;²² placing a large sign in a garage window stating that the plaintiff owed the owner money;²³ copyrighting pictures of plaintiff's deformed children;²⁴ unauthor-

¹⁷ *Hillman v. Star Publishing Co.*, *supra* note 6. No recovery allowed in suit for damages. Court calls the authority recognizing privacy "instructive."

¹⁸ *Itzkovitch v. Whitaker*, 115 La. 479, 39 So 499 (1905), 117 La. 708, 42 So. 228 (1906); *Schulman v. Whitaker*, 117 La. 704, 42 So. 227 (1906). Injunctions granted in both cases. The right of privacy is apparently assumed, the court stating that equity will protect such an invasion of private rights, and that every one who does not violate the law can insist upon being let alone. The court, however, considers the cases only remotely analogous to cases of the type of the *Roberson* case.

¹⁹ *Chapell v. Stewart*, 82 Md. 323, 33 Atl. 542, 37 L. R. A. 783 (1896). Injunction denied, court holding that ordinary processes of law are fully competent to redress all injuries of this kind and that equity has no jurisdiction to protect personal rights. But *Schultz v. Frankfort Marine, etc. Ins. Co.*, 151 Wis. 537, 139 N. W. 386, 43 L. R. A. (N. S.) 520 (1913), held that "shadowing" damaging the plaintiff's reputation constituted a cause of action apart from physical restraint. The case apparently did not turn on the issue of privacy, but obviously one of the rights protected by the decision is that of privacy.

²⁰ *Corliss v. Walker*, 57 Fed. 434 (1893), 64 Fed. 280, 31 L. R. A. 283 (C. C. D. Mass. 1894). Injunction denied because Corliss was a public character. Court, by way of dictum, says that a private individual has the right to be protected against the representation of his picture in any form, and that this is a property as well as a personal right.

²¹ *Schuyler v. Curtis*, 147 N. Y. 434, 31 L. R. A. 286 (1895). Injunction denied, court holding that even if privacy exists it is purely personal and abates with the death of the person; that plaintiff must stand on some injury to himself and such cannot be shown by proving that the deceased would have objected during her lifetime.

²² *Marks v. Jaffa*, 6 Misc. Rep. 290, 26 N. Y. S. 908 (1893). Injunction granted by Superior Court of New York City on ground that equity will protect the right to be let alone. This case is weakened as authority because it was decided by an inferior court in New York before the decision of the *Roberson* case (which distinguished it).

²³ *Brents v. Morgan*, *supra* note 14. In sending the case back for a new trial the court held that damages would be recoverable for invasion of privacy. In cases of this nature a count in libel may usually be joined because there is an inference that the plaintiff is trying to evade the payment of his just debts. For cases involving actionable methods of attempting to collect debts see note (1928) 55 A. L. R. 971.

²⁴ *Douglas v. Stokes*, *supra* note 15. The children were dead. Defendant, a photographer, made several photographs above the number he contracted to

izedly taking pictures of a polar expedition;²⁵ and filing a false birth certificate attributing to the plaintiff the fatherhood of an illegitimate child.²⁶

Assuming that the present trend is toward the recognition of privacy, the ultimate questions, at least in damage suits, become: what must be alleged to state a cause of action and what proof of damages is necessary? It seems that special damages need neither be alleged nor proved²⁷ (except, perhaps, in the case of a corporation),²⁸ though they might be shown in aggravation. It is only necessary to state such facts as show an invasion of privacy and generally to allege humiliation and suffering.

Proof of this general allegation of humiliation and mortification could be furnished by the testimony of the plaintiff himself²⁹ and by the testimony of friends and acquaintances concerning their reaction to the matter in litigation. The injury to privacy is subjective, as distinguished from the objective injury involved in defamation; yet it is undoubtedly true that the spiritual injury arises out of knowledge of the effect the invasion of privacy will have upon the minds of others. Hence the testimony of friends should be admissible as evidence from which the jury could infer that the plaintiff was humiliated.³⁰ In the last analysis recovery rests upon

make. Damages allowed. The decision is based on breach of confidence, but the court, in a dictum, says that plaintiff could have recovered had defendant attempted to exhibit the bodies. Such an action would be based upon the right of privacy.

²⁵ *Smith v. Surratt*, 7 Alaska Rep. 416 (1926), commented on in (1929) 27 Mich. L. Rev. 353. Injunction denied. This case was a controversy between the Pathe and International News Services and, though the right of privacy is expressly raised, the case really smacks more of unfair competition than of privacy. See *infra* note 35.

²⁶ *Vanderbilt v. Mitchell*, *supra* note 15. Injunction granted because of property rights involved. But the court expressly states that it would grant relief regardless of the property rights.

²⁷ This, like most of the law of privacy, was suggested by Warren and Brandeis. The *Pavesich* case made it law. It has since been approved by *Munden v. Harris*, *supra* note 12; *Foster Milburn Co. v. Chinn*; *Brents v. Morgan*; and *Kunz v. Allen*, all *supra* note 14.

²⁸ This qualification is based on an analogy to defamation. And *Vassar College v. Loose-Wiles Biscuit Co.*, 197 Fed. 982 (D. C. W. D. Mo. 1912), in refusing an injunction mentioned, among other things, that no special damages were alleged. See *infra* note 39.

²⁹ This seems fairly obvious, yet in some cases it might be impractical. For instance, in the case of *Munden v. Harris*, *supra* note 12, the plaintiff was five years old. His age was not discussed in connection with the count for the invasion of privacy, though it was considered in connection with the count for libel.

³⁰ No direct authority is found to sustain this proposition. The point has not, apparently, been squarely raised. In *Foster-Milburn Co. v. Chinn*, *supra* note 14, the court held that plaintiff was properly allowed to show that he had

whether or not the jury believes the plaintiff actually suffered mortification and mental anguish.³¹

On principle there should be no difference between the action for damages and the bill in equity insofar as sufficiency of complaint and proof are concerned. Only two differences are likely to arise. (1) In an advertising case, if the prayer is for an injunction and an accounting, whatever is allowed on the accounting would be in the nature of recovery for profits made by wrongful use of plaintiff's property rather than in the nature of compensation for injury to plaintiff's sensibilities.³² (2) In a state where the question first arises in equity the bill might be demurrable if the court takes the traditional attitude that equity will not interfere unless the right has been recognized at law.³³ As a practical matter, however, equity has often set its own standards of conduct in injunction cases. And further, as heretofore pointed out, there is no longer a lack of legal precedent recognizing the right.

Certain limitations upon the right were suggested by Messrs. Warren and Brandeis. These limitations, based upon analogies to the law of defamation and of literary property, are apparently sound

been ridiculed and laughed at by his friends, such evidence being competent to show his mortification. This holding was in connection with the libel side of the case, but mortification is one of the chief elements of damage in privacy and hence such evidence should be admissible in privacy actions. And in *Kunz v. Allen*, *supra* note 14, the court remarks that the trial judge unduly limited plaintiff's proof that the publication caused her to be talked about.

If the witnesses testified, however, that the publication did not lessen their opinion of the plaintiff it does not follow as a necessary inference that the plaintiff suffered no damage. This situation arose in the *Kunz* case and the court held that it merely proved the sincerity of the friendship entertained by the witnesses for the plaintiff.

³¹ In *Brents v. Morgan*, *supra* note 14, the court, in remanding the cause for a new trial, outlined an instruction for the jury providing, in substance, that if the jury believed that the plaintiff actually suffered "mental pain, humiliation and mortification" they should allow recovery. In *Schuyler v. Curtis*, *supra* note 21, however, one of the grounds for refusing an injunction was that the defendants had done nothing which would affect unpleasantly the mental condition of any "sound, reasonable, intelligent man or woman." But damages in privacy should be based on actual injury, as in the *Brents* case, and not on reasonableness. And the jury will, of its own accord, place enough restraint upon recovery by way of demanding reasonableness. See *Larremore*, *op. cit. supra* note 6.

³² If the accounting is allowed, thus recognizing the property right, it will bring the case within even the narrow test of *Gee v. Pritchard*. And such allowance of an accounting will furnish an additional reason why plaintiffs will prefer to bring their actions on the theory of property rights. See note 16, *supra*.

³³ For a general discussion of equity's jurisdiction and attitude in tort cases see Chafee, *Does Equity Follow the Law of Torts?* (1926) 75 Pa. L. Rev. 1.

and have found considerable favor.³⁴ They are: (1) privacy does not prohibit publication of matter which is of general or public interest;³⁵ (2) privacy does not prohibit publication under circumstances which would render it privileged under the law of defamation;³⁶ (3) there should be no redress for an oral publication unless special damages be shown; (4) the right ceases upon publication by the individual or with his consent;³⁷ (5) truth of the matter published is no defence;³⁸ (6) absence of malice is no defence. To these should be added the limitation that some distinction should be drawn between individual and corporate privacy.³⁹ And, carrying the analogy to defamation a little further, it may be supposed that proof of actual malice would vitiate the defence of privilege.

It has been suggested that recognition of privacy will open up too broad a field and put the courts to the necessity of having to exclude many cases; and that the most effective way to handle the matter would be to have an action for "wrongful publicity" causing senti-

³⁴ Practically every case recognizing the right of privacy cites the Warren-Brandeis article. And *Brents v. Morgan*, *supra* note 14, takes up each of the limitations and expressly approves them.

³⁵ Thus a man who has become a public character to some extent sacrifices his right of privacy. *Corliss v. Walker*, *supra* note 20. Objection has been made to this on the grounds of difficulty of application. But certainly it will be no harder to apply than the negligence test. The test is essentially one for the jury and should be whether, under the circumstances, the publication is legitimate because of the plaintiff's connection with public life or an event of public interest. For a case involving an event of public interest see *Smith v. Surratt*, *supra* note 25, holding that there is no right of privacy where a polar expedition is involved. In general see *Larremore, op. cit. supra* note 6 and (1912) 10 Mich. L. Rev. 335. This limitation should be of no importance in the advertising cases.

³⁶ There is apparently no direct authority on this. However, in *Folsom v. Marsh*, 2 Story 100, Fed. Cas. No. 4, 901 (C. C. D. Mass. 1841), in a case involving property rights in letters, the court recognizes that the recipient may publish them to vindicate his character or to establish a legal right.

³⁷ Such consent need not be express; it may be implied. *Munden v. Harris*, *supra* note 12.

³⁸ In *Brents v. Morgan*, *supra* note 14, the court allowed recovery for invasion of privacy though a statute made truth a defence to libel in every case. This is the greatest difference between defamation and privacy, and privacy offers a welcome loop-hole by which to escape the ironclad rule of justification in the law of defamation. See *Wettach, Recent Developments in Newspaper Libel* (1928) 7 N. C. L. Rev. 3, 11.

³⁹ There may be some doubt as to whether a corporation has a right of privacy. *Vassar College v. Loose-Wiles Biscuit Co.*, *supra* note 28, apparently the only case in which the plaintiff is a corporation, denied the existence of any right of privacy and hence did not discuss the secondary question. Obviously, however, a corporation cannot suffer humiliation and mortification in the same sense that an individual can. If it is to be given a right of privacy such right must be a limited one. Probably it should be limited to cases where the corporate name was being illegitimately employed, where the law of unfair competition would not offer redress, and where special damages could be shown.

mental injury, which would include defamation and a properly limited privacy.⁴⁰ This suggestion is hardly practical. Defamation and privacy are closely related and supplementary, but they would hardly make good bedfellows. Any attempt to combine the two immediately meets the difficulties that truth is a defence in defamation and that equity will not enjoin a libel. If these distinctions are kept then there is no advantage to be gained from the fusion; if they are not kept then the fusion results in an upheaval in the law of defamation which will be much more shocking to the legalistic mind than the mere recognition of privacy. And to give a "wrongful publicity" action merely as a limited right of privacy, exclusive of the question of defamation, would serve only to make a somewhat arbitrary division of a general right, would meet with the same difficulties now confronting the growth of the law of privacy, and would probably result in the exclusion of more than one legitimate case unfortunate enough to differ in degree though not in kind. The best solution seems to be to continue along the trail now blazed by authority.

HENRY BRANDIS, JR.

ADMISSIBILITY OF PHOTOGRAPHS AS EVIDENCE

Long ago, the poet Horace spoke of the greater effect of that which is seen than of that which is described by words.¹ There are three ways of appealing to the eyes of the jury: (1) by production of the "primary real evidence",² a thing or object for the per-

⁴⁰ Note (1910) 24 L. R. A. (N. S.) 991. The argument is that the phrase, "wrongful publicity" presupposes that there are forms of publicity which are not actionable, and thus the field is limited.

¹ "Aut agitur res in scenis, aut acta refertur,
Segnius irritant animos demissa per aurem,
Quam quae sunt oculis subjecta fidelibus, et quae
Ipse sibi sibi tradit spectator" (Horatius ad Pisones)."

See Warlick v. White, 76 N. C. 175, 179. For effective use of photographs in disputed document cases, see OSBORN, *THE PROBLEM OF PROOF* (1922). In general, see 2 WIGMORE, *EVIDENCE*, ch. 37, p. 1344, "Autoptic Preference."

² The classification by Bentham of all evidence into real evidence, as the evidence of *things*, and *personal* evidence as that of persons, has inaugurated a long train of errors in the theory of proof: see GULSON, *PHILOSOPHY OF PROOF*. (2d Ed. 1923). Mr. Gulson says real evidence differs from personal only in the mode in which a fact is laid before the tribunal. "It is evidence obtained by the court through the mere exercise of its own perceptive faculties, while 'personal' as defined by Mr. Best, is the evidence acquired through the perceptions of other persons or witnesses, who report or communicate their experience to the tribunal."

"Primary evidence" of a thing is the term applied by our jurists to the real evidence of its own nature afforded by the production in court of the thing or document itself; any other mode of proving the terms of the document or the nature of the thing being designated by the phrase "secondary evidence": GULSON, *PHILOSOPHY OF PROOF*. (2 Ed. 1923), p. 258.